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valuable securities carried by the plaintiff were not a part of the property, which he could in his ordinary relation of passenger of the defendants bear about his person at their risk, and under their duty as carriers to protect him and his necessary, convenient and ornamental reasonable personal chattels and money; that for that reason the value of them does not properly enter into an estimate of the damages with which they should be charged, on a recovery by him against them, for not protecting him from violence while he was rightfully in their car, they being assumed to be guilty of negligence therein, and he being taken as free from contributory negligence. It was error then, under the circumstances of this case, to submit any question to the jury. The complaint should have been dismissed. We think that the question we have determined was fairly presented by the motion to dismiss the complaint on the ground that this "injury and grievance is too remote to charge the defendants with damage," and that, "under all the circumstances of the case, the plaintiff has no legal ground for a recovery" against them.

The order for a new trial must be affirmed, and judgment absolute given for the defendant on the stipulation.

United States Circuit Court, Eastern District of Virginia.

W. T. BLACKWELL ET AL. v. W. E. DIBRELL ET AL.

A trade-mark, consisting of a word and symbol, arbitrarily assumed, may be lost by non-use, especially if the disuse continue as long as eight years.

If an equivalent trade-mark is, without any knowledge of the first one, originated and devised by another person during the period of such disuse, for use at a particular place, or for a commodity of a particular region, that other person may thereby acquire a right of exclusive use in the second trade-mark, at such place, on such product, and may enjoin the general use of the first trade-mark.

If the second trade-mark, during such period of disuse, acquires a peculiar geographical and commercial signification, so that the use of the original one, as an arbitrary device, would operate to deceive and defraud the public, a court of equity may enjoin against the use of the first trade-mark.

In order to constitute one suit an estoppel in another, four conditions must exist, viz.: there must be an identity of the cause of action, of the parties, of the character in which the parties sue, and of the thing in controversy.

BILL in equity for an injunction and account. The facts as they appeared in the pleadings and the evidence were that some time before the year 1860, the North Carolina railroad was laid off over the farm of Dr. Bartlet Durham, in Alamance county, North Carolina. A station was established there and called *Durham's Station*. This

spot shortly became the seat of a small tobacco factory, a blacksmith shop, a tavern, and the residences of two or three families. It remained an insignificant place until after the civil war, in 1865. It then began to grow up under the effects of a very prosperous tobacco business which had arisen there. In 1866 it was incorporated as a town and called *Durham*. Now it is a place of several thousand inhabitants, and of a very large business.

The original tobacco factory of 1859 was conducted by the firm of Morris & Wright. This firm principally manufactured plug tobacco, but it utilized its clippings and waste tobacco by putting it in bags and disposing of it as smoking tobacco.

Some time before or in 1861, one of the partners of this firm, William A. Wright (who is connected with the defence in this suit), sold out all his interest to the other partner, Morris, and went off into the neighborhood, where he manufactured tobacco in a rude way for a year, and then joined the Confederate army and disappeared from *Durham's Station*. The business, however, went on under Morris, and subsequently by assignment under one Green. The latter adopted as his brand or label the name "Durham Smoking Tobacco," and connected with these words the side figure of a short-horn bull, as a symbol of the word *Durham*; and he had a full-size painting of such a bull placed broadside upon his factory, in conspicuous view of the railroad, as an advertisement of his business to all travellers. Green having died, his business passed by succession and assignment to Blackwell and others, and is now conducted by W. T. Blackwell & Co., the complainants in this cause.

The other partner, Wright, of the original firm of Morris & Wright, who had sold out in 1861, began in 1869 the manufacture of tobacco in Liberty, Va., and subsequently in Lynchburg. While at Liberty, hearing that J. R. Green, the successor to Morris & Wright, at *Durham*, was using the *Durham* bull as a trade-mark, he adopted the device of the head and neck of a short-horn bull on his tobacco. While at Lynchburg, in 1871, Wright sold to S. S. Armstead a patent which he had then recently obtained (No. 111,712) for a compound liquid flavoring which he used in making "an improved smoking tobacco" called "Durham Smoking Tobacco," in which appellation he used the word *Durham* as an arbitrary term for the smoking tobacco made with the said patented flavoring liquid. It appeared from the answer of defendants, Dibrell & Co., that they used, with the consent and by the authority of the said

Wright, a label substantially the same as that used by the complainants, and filed by them as an exhibit, to wit, a label having the words and device "Established 1860, at Durham, N. C., the original Durham Smoking Tobacco, W. S. Wright, originator and patentee."

The complainants claimed that the reputation of Durham smoking tobacco was owing to the influence of the climate and soil of that part of North Carolina, whose product was brought to Durham Station and there put up with great care and skill by themselves; and further, that a circumstance at the close of the war gave their manufacture under this name its widespread reputation. At the time that Sherman's and Johnston's armies were in Alamance county, Green happened to have a large quantity of loose leaf tobacco lying in bulk on the floor of his factory. Of course this was a prey which soldiers of either army, as they passed along, eagerly seized upon; and the evidence is, that the whole of this loose tobacco was thus carried away; and, as the armies were soon disbanded, much of it is conjectured to have been carried into distant parts of the Union. At all events, the excellent quality of this smoking tobacco speedily obtained widespread advertisement and celebrity; and ever since then orders have come to Durham for it from every quarter of the United States.

The complainants therefore claimed that the word Durham, as a trade-mark for smoking tobacco, was a geographical and descriptive term and could not be lawfully used to describe other tobacco not prepared at that place. They moreover denied that it was used by Morris & Wright or by any one prior to Green in 1865, but claimed that even if it was used by Morris & Wright, they were entitled, as the successors of that firm, to its exclusive use at the present time. The defendants, on the other hand, who claimed title under Wright, insisted that the word Durham, as used by them or their assignor Wright, had no reference to the place called Durham's Station; that Wright, when he manufactured tobacco near Durham's place, then of utter insignificance, used the word Durham as an arbitrary term; that his tobacco was flavored with certain liquids invented and artificially concocted by him; that it was this flavoring, and not the soil or climate of the region trading to Durham, that gave his tobacco its excellence, and that the name Durham and the device of a Durham bull were suggested to him, about the year 1860, by seeing the brand of *Durham mustard* on a tin box. Wright's testi-

mony on this head is as follows: Was in business at Liberty, Va., in 1869; that was the first time the bull's head was used; first view was to adopt the entire bull in connection with the word Durham; the reason of not doing so was that two sons in Kentucky wrote him that J. R. Green, of Durham, N. C., had adopted the bull on his brand, and he did not wish to interfere with anything that was ahead of him; first conceived the idea of using the word Durham and the bull in connection with it in 1860; and the reason why he did not carry it out until 1869 was his inability to do so for want of funds; the idea was first suggested by picking up a can of Durham mustard with the vignette of a bull on it.

Wright claimed that Morris & Wright used the word Durham in their labels in 1859 and 1860, and that he himself used the word in his label when living near Durham in 1861.

In 1871 a suit was brought in the Superior Court of North Carolina, by W. T. Blackwell against W. A. Wright (*Blackwell v. Wright*, 73 N. C. 310), in which the complainant, claiming a right to the exclusive use of the word Durham, as a descriptive term for his smoking tobacco on the same label with his symbolic trade-mark of the side view of a short-horn bull, sought to enjoin the defendant Wright from using the same word Durham as a description of his smoking tobacco upon a label similar in color, material and general appearance, having on it the head and neck of a short-horn bull. The suit was a trade-mark suit, and the complaint contained no charge of fraud in deceiving the public, and no prayer for an injunction to prevent the use of a label deceptively assimilated to that of the complainant. This suit, after going to the Supreme Court of North Carolina, was dismissed on demurrer to the complaint, the demurrer being based on the ground that the complainant did not, by formal allegations of assignments, trace his title to the exclusive use of the trade-mark in question from J. R. Green.

In the same year a suit was brought in the United States Circuit Court for the Western District of Virginia, at Lynchburg, by W. T. Blackwell and J. S. Carr, partners trading under the firm-name of W. T. Blackwell, against S. S. Armistead (*Blackwell v. Armistead*, Browne on Trade-mark 510). In that suit the complainants claimed the exclusive right to use the trade-mark already described, including the word Durham and the side view of a short-horn bull, charged an infringement of it by Armistead, as assignee of William

A. Wright, in the use of the label of Wright, also already described, and prayed an injunction against all further use of the last-named label. In this suit the complainants prevailed, and a perpetual injunction was granted, and the matters in controversy were afterwards compromised.

Under these facts complainants prayed an injunction against defendants' use of the word Durham in connection with smoking tobacco, and an account.

S. F. Phillips and *W. A. Maury*, of Washington, *L. R. Page*, of Richmond, and *J. W. Daniel*, of Lynchburg, for complainants.

W. D. Browne, of Washington, and *Williams & Digges*, of Lynchburg, for defendants.

The opinion of the court was delivered by

HUGHES, J.—It is useless to review all the points relied upon by counsel on each side in their able arguments in the cause. I shall consider only those questions upon which, in my judgment, the case really turns.

I shall first deal with the objection of estoppel or *res judicata*, urged by each party against the other.

In order for one suit to constitute an estoppel upon any party to another suit, four conditions must co-exist, viz. : 1. There must be an identity of the cause of action ; 2. There must be an identity of parties to the suits ; 3. There must be an identity in the character or quality of the respective parties ; and 4. There must be an identity of the thing in controversy. See *Smith v. Turner*, 1 Hughes 375.

These conditions of identity do not exist between the present case and either of the cases of *Blackwell v. Wright*, or *Blackwell v. Armistead*. Those cases, therefore, do not operate as estoppels. Nor do they at all affect the one now under consideration, except so far as they are precedents of authority upon the principles which were decided by them. In *Blackwell v. Wright*, the decision was upon demurrer to the complaint ; and in technical effect it was only that Blackwell had not traced his title to his trade-mark by proper allegations from Green ; while on the merits the decision went only so far as to determine that the allegations of the complaint did not make a case of exclusive right to the trade-mark for the plaintiff. The complaint there did not charge that Wright's

use of the trade-mark was a fraud upon the public, or pray for an injunction on that ground. None of these allegations can be made of the complainants' bill in this case.

In *Blackwell v. Armistead* it is true that the decision was upon the principal questions raised in the present case ; but owing to the character of the pleadings it was based upon grounds narrower and more technical than those upon which I propose to found the present decision: That suit was a trade-mark case. This is more, and involves the question of the fraudulent use of a trade-mark, to the injury of the public at large, as well as of the complainants. Therefore, neither of the two cases which have been urged in estoppel governs even as a precedent the present one, which I shall now proceed to consider.

Two questions arise upon the pleadings and evidence : 1. The first is, whether the defendants have any right at all to use a label in which the word *Durham* is used as descriptive of smoking tobacco, and in which the figure of a short-horn bull is used as a symbol of the word Durham ; their right to the *exclusive* use of it not being claimed ; 2. The second question is, whether the complainants have a right to the *exclusive* use of such a label. In considering the first question, I shall, for the sake of brevity, speak of the defendants' right to use the label described as Wright's, inasmuch as their title to use such a label could come, under the evidence in this cause, only from Wright. Has, then, Wright or his assignees now, or have they at any time since 1869 had, any right *at all* to use a label having in it the word *Durham*, as descriptive of smoking tobacco, and having also in it the figure of a short-horn bull, or any part of that animal, as a symbol of the word Durham ? Of course their title to use the word and the symbol stands on the same basis ; if it fails as to the *word* it fails also as to the *symbol* of the word. There can be no doubt of Green's original right to the exclusive use of the full figure of a short-horn bull as a trade-mark. That is virtually conceded by Wright himself in his testimony. As to the word Durham as descriptive of smoking tobacco, the right to use it is in this cause claimed by defendants, who do business in Richmond, Va., and who advertise and sell, as *Durham* smoking tobacco, tobacco which they put up in Richmond, and which they obtain from any source available to them other than Durham.

Such a practice necessarily deceives every purchaser who, in purchasing *this* "*Durham*" smoking tobacco, believes that he is pur-

chasing the fine tobacco put up in the place of that name in North Carolina. Dibrell & Co. claim solely from Wright. What, then, is Wright's title under which this deception comes about? He claims that he did not in 1860 sell his right in the label used by Morris & Wright, to his partner Morris, when he sold all his interest in the business. He claims that he derived the word *Durham* and the device of a short-horn bull from a *Durham* mustard box. He pretends that neither the word nor the device, as invented and used by him, was descriptive or geographical in purport, but that they were arbitrary symbols, and that having been so at the beginning, he and his assignees have still a right to use them.

The objection to this pretension lies not merely in the improbability of the origin of the use of the word *Durham* and its symbol which Wright recounts, or in the unsatisfactory character of the evidence on which his original right to use the word and its symbol is based, or in the presumption that when he sold in 1861 he sold *all* his interest to Morris; but it lies also in these two facts, namely: 1st, that whatever title Wright had to the use of the word *Durham* after leaving Morris, in or about the year 1861, was lost by non-use, his disuse continuing through a period of probably eight or nine years after he left the vicinity of *Durham's*; and, 2d, that during this long period of disuse the brand of *Durham Smoking Tobacco* acquired a definite and peculiar meaning with dealers and consumers; the word *Durham* ceasing to be (even if it ever was) a mere arbitrary term; and obtaining a geographical signification as to the place *Durham*, and a commercial signification as to the article of tobacco manufactured at *Durham*. During the interval of disuse the phrase *Durham* tobacco had come to indicate that portion of the product of a particular region of country which was marketed at the place called *Durham's* or *Durham*. The phrase "*Durham Smoking Tobacco*" had come to indicate in all markets and among all dealers and consumers the smoking tobacco marketed and manufactured at this place of *Durham*, in North Carolina.

It was not until after this signification had attached to the phrase that Wright adopted (or, as he pretends, returned to) the use of the word *Durham*, which he had abandoned. If, as he claims, the word *Durham* had in fact been used by him at first as an arbitrary trade-mark; and if, in addition, he had continued the use of it without interruption down to 1866 and on to the present time, that use by him would itself have prevented the other and local signification from

attaching to the brand and word; for, in that case, Durham smoking tobacco would have described *two* tobaccos: first, those marketed and manufactured at Durham; and, second, those sprinkled with Wright's "*Durham*" juice.

But he did abandon its use; he stood by for some eight years and allowed a peculiar commercial and local signification to attach to the word Durham as descriptive of smoking tobacco, and not until after that local and commercial signification had come to identify the tobacco labelled with the word all over the country as coming from a particular region, and as having a particular quality, and not until after this brand had come to be worth thousands of dollars to the manufacturers of this particular tobacco at this particular place, did he begin (or resume) the use of the device, which he claims to have derived from the mustard can. To put that word now on tobaccos grown elsewhere than at Durham, even though sprinkled with his "*Durham*" decoction, is, in the light of the evidence in this case, to pass them off as tobaccos coming from Durham, and is to deceive and defraud all who deal in and purchase the commodity as smoking tobacco from Durham. It has so come to pass, from Wright's non-use for eight years, that to manufacture and sell other tobaccos at all and brand them with the word Durham, is to deceive the public, no matter what liquid may be used on them. Under existing circumstances, to manufacture even Durham tobaccos elsewhere than at Durham and to sprinkle them with a foreign liquid, is to deceive the public generally and those who put up the genuine article at that place particularly. The manufacture of these tobaccos at that place is the best guarantee which the public and the trade can have that the commercial article labelled *Durham Smoking Tobacco*, and sold in all markets, is genuine, and prepared under the fewest temptations to adulteration.

That the right to use a trade-mark may be lost by abandonment or disuse is too clear to need argument or the support of authority. The law of the subject is stated in the chapter on Abandonment, sects. 674 to 691, of Browne on Trade-marks. It cannot be pretended that in Green's first use of his label, in 1865 or 1866, he had any intention of taking up an old label at second hand, or had any knowledge or belief that Wright or any one else could claim the label which he then devised as entirely novel and peculiar. The field was open to his enterprise and invention for establishing his business and inventing his label and trade-mark just as he did.

Green's adoption in 1865 or 1866 of the word *Durham*, as descriptive of the best tobacco of North Carolina, put up by him, and of the bull as the symbol of the word, was naturally suggested by the facts of his business. If Wright had ever had such a label, which I do not feel that the evidence warrants us to believe, it was in 1865-'6, unknown in Durham; had been abandoned even then for some four years; had never signified anything but tobacco sprinkled with Wright's decoction; and had never borne the valuable and creditable commercial signification which the climate and soil and good husbandry of North Carolina and the enterprise of a Durham manufacturer were about to give it.

By the several facts of Wright's non-user of the label for eight years; of its never having, even as claimed by him, had any but an arbitrary significance as tobacco sprinkled with a species of artificial treacle; and of its having, during a long period of disuse, acquired a new, wholly different and well and widely-known geographical and commercial signification, Wright lost his right of using the label altogether. His use of it now operates necessarily to mislead and deceive the public as to the source of production and quality of the article bearing the label, thereby defrauding them; and the court will therefore make a decree of perpetual injunction against his further use of it.

2. As to the second question, whether Blackwell & Co. have an exclusive right to the use of the label described in the pleadings, I think, on the evidence submitted, that they have. We have no hesitation in so deciding as against the defendant in this cause, and will incorporate in the decree of the court an order for an account of profits against the defendants, as prayed for in the bill.

The label and trade-mark of complainants was established in 1865, by J. R. Green. His business and that of his successors built up the insignificant and obscure place "Durham's Station," into the flourishing town "Durham." The town grew up during the first four or five years of the use of the label, and owed its growth in chief part to the business indicated by the label. In that respect the case is similar to that of the trade-mark Cocoaïne: *Burnett v. Phalon*, 3 Keyes 594. In respect to the commercial article bearing the geographical name, it is similar to that of the Akron cement: *Newman v. Alwood*, 51 N. Y. 189. The right of the complainants in this case has the double strength of that of the proprietors of the trade-mark Cocoaïne and of that of the Akron

cement. The use of the principal characteristics of their trade-mark by manufacturers not conducting their business at Durham is a deception put upon the public, and may be enjoined on that ground alone, irrespectively of the trade-mark right. The use of the trade-mark invented by Green, under which he and his successors built up his trade, and built up the town of Durham, like the use of the word Akron to the proprietors of the commercial article bearing that name, belongs exclusively to the successors of Green, and the court should secure its exclusive use to them.

I had some doubt whether, in a litigation between Blackwell & Co., on one hand, and defendants not doing business in the town of Durham on the other, it was competent for the court to decree that Blackwell & Co. have the exclusive right to the use of the word and symbol characterizing their trade-mark; but it is certainly competent for us to render a decree responsive to the issues made up by the allegations and denials of the bill and answer, one of which is this right of exclusive use claimed by Blackwell & Co. As between the complainants and defendants in this suit, therefore, we may so decree, even though other persons than the defendants to this record be not bound by the decree.

Supreme Court of Mississippi.

B. H. SMITH v. THE STATE.

An untrue assertion by a person who is endeavoring to procure goods on credit, that he is not trading with and is not indebted to any other person, is a sufficient false pretence to support an indictment.

Where the representations were partly true and partly false it is not necessary that the selling of the goods should have been induced by the false alone, or that the false should be independent and disconnected from the true; it is sufficient if the false formed a constituent and material part of the inducement without which the goods would not have been sold.

Nor is it necessary that the false pretence should be such as would have deceived, or been likely to deceive, a man of ordinary prudence.

PLAINTIFF in error was convicted, in the Circuit Court of Rankin county, of obtaining goods under false pretences, and sentenced to three years' confinement in the penitentiary. From this judgment he appealed to this court. The facts are set forth in the opinion of the court, which was delivered by

CHALMERS, J.—The false pretences alleged were four in number :
1. That he had a good crop ; 2. That he had, or would make, seven